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No. 91-712

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent contends (Br. in Opp. 7) that the court of appeals' decision rests on two "uncomplicated propositions": that the United States' extradition treaty with Mexico prohibits the kidnapping of a Mexican national on Mexican territory; and that treaty violations can affect the jurisdiction of the courts of the United States. We agree with respondent that these propositions are uncomplicated. As applied to the treaty at issue in this case, however, they are demonstrably incorrect.

Respondent's contentions essentially track those advanced in the brief in opposition filed by the respondent in *United States* v. *Verdugo-Urquidez*, petition for cert. pending, No. 91-670, and, for the reasons given in our reply brief in that case, respondent's

legal analysis is without merit.[1] The remedy of repatriation that the court of appeals ordered in this case squarely conflicts with the *Ker-Frisbie* doctrine [2] and a consistent line of decisions of this Court indicating that, absent clear directions in a treaty or statute, a criminal defendant enjoys no immunity from prosecution based on the manner by which he was apprehended and brought before the court. And respondent's defense of the Ninth Circuit's creation of an implied treaty obligation underscores that court's striking departure from proper principles of construction of this Nation's international obligations.

The extradition treaty does not say, clearly or otherwise, that it prohibits unilateral acts by one treaty partner to gain custody over a suspect located in the territory of the other; nor does the treaty contain any language that purports to regulate the jurisdiction of the United States courts where extradition is not involved. Respondent relies on Article 9 of the Treaty, [3] which states that an asylum state is not obligated to deliver up its nationals in response to an extradition request. That article, however, does not purport to place obligations on either country where extradition is not sought. Nor is there anything in the "manifest scope and object of the treaty itself" (Br. in Opp. 8, quoting *United States* v. *Rauscher*,

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[1] We have provided respondent with a copy of our reply brief in *Verdugo*.

[2] See *Ker* v. *Illinois*, 119 U.S. 436 (1886); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952).

[3] Extradition Treaty between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059, 5065 T.I.A.S. No. 9656, *reprinted at* Pet. App. 74a.

119 U.S. 407, 422 (1886)) that justifies amending the treaty to impose significant obligations on conduct by a treaty partner absent an extradition request. And there is no justification for incorporating into the extradition treaty general principles of international law, derived from other sources, regarding the territorial rights of nations. Those principles are explicitly defined in other treaties and by customary international law, none of which is enforceable at the behest of private parties asserting rights in United States courts.

2. Respondent argues (Br. in Opp. 11-16) that review is not warranted because this case involves "unique circumstances." But the court of appeals' unprecedented view of its role in interpreting and applying this country's extradition treaties raises questions that are of inherent national and international importance. An indication of the character of the issues at stake is found in the fact that the government of Mexico, as it did in *United States* v. *Verdugo-Urquidez*, petition for cert. pending, No. 91-670, has filed an amicus curiae brief in this Court stating that, although Mexico agrees with the court of appeals' decision, this Court should grant review to assess "the effect on the administration of justice in the United States of the petitioner's violation of its treaty obligation to Mexico." Amicus Br. of the United Mexican States, at 7. In light of the international dimensions of this case, and the need for clarity in the application of this Nation's treaties bearing on international law enforcement, this Court's review of the question presented is warranted.

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For the foregoing reasons and those stated in our petition, it is respectfully submitted that the peti-

tion for a writ of certiorari should be held and disposed of in light of *United States* v. *Verdugo-Urquidez*, No. 91-670. Alternatively, the petition should be granted and the case should be consolidated with *Verdugo*.

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